UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

INITIATIVE & REFERENDUM INSTITUTE, et al.,	)	
Plaintiffs	)	
v.	)	***Civil No. 98-104-B-C***
SECRETARY OF STATE OF STATE OF MAINE,	)	
Defendant	)	

MEMORANDUM DECISION ON MOTION TO STRIKE AFFIDAVIT AND RECOMMENDED DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The Initiative & Referendum Institute ("IRI"), Progressive Campaigns, Inc. ("PCI")[1], Jason Smith, Shannon L. Brady, Nancy Falster, On Our Terms '97 PAC ("On Our Terms"), U.S. Term Limits and Americans for Sound Public Policy ("ASPP") challenge the constitutionality of restrictions on the circulation of initiative and referendum petitions[2] in Maine, including a proscription on payment per signature to petition circulators and requirements that such circulators be both residents of, and registered voters in, the State of Maine. Complaint (Docket No. 1).

[1]Although PCI is captioned "Progressive Campaigns," its full name is Progressive Campaigns, Inc. Deposition of Angelo Paparella ("Paparella Dep.") at 5.

[2]Subsequent references to "initiatives" encompass referenda as well.

Specifically, the plaintiffs charge that the restrictions offend (i) their First Amendment right to promote initiative petitions, including the rights of non-registered voters and persons too young to register to vote to circulate petitions (Counts I-III), (ii) the right of non-residents to earn a living collecting signatures in Maine, in contravention of the privileges and immunities clause, U.S. Const. art. IV, § 2 (Count IV), (iii) the right of the plaintiffs to travel to Maine for legitimate commercial purposes relating to the petition process, in contravention of the commerce clause, and (iv) the plaintiffs' due-process and equal-protection rights (Count VI). *Id.* ¶¶ 18-29. The plaintiffs seek declaratory and injunctive relief and attorney fees pursuant to 42 U.S.C. § 1988. *Id.* ¶¶ 16-17.

The plaintiffs and defendant Secretary of State of the State of Maine ("Secretary") now cross-move for summary judgment. Motion for Summary Judgment, etc. ("Plaintiffs' SJ Motion") (Docket No. 15); Defendant's Motion for Summary Judgment, etc. ("Defendant's SJ Motion") (Docket No. 17). The plaintiffs in addition move to strike the affidavit of Denise J. Garland, and the Secretary cross-moves to allow the affidavit, in connection with the summary-judgment motions. Motion To Strike Affidavit of Denise J. Garland ("Strike Motion") (Docket No. 34); Defendant's Objection to Plaintiffs' Motion To Strike Affidavit of Denise J. Garland and Cross-Motion, etc. (Docket No. 35). For the reasons that follow, I grant the Secretary's cross-motion to allow the Garland affidavit and deny that of the plaintiffs to strike it, and recommend that the Secretary's motion for summary judgment be granted in part and denied in part and that of the plaintiffs for summary judgment be denied.

I. Motion To Strike Affidavit

In a telephone conference with counsel held on January 27, 1999 I agreed to allow limited supplemental briefing to address the issue of the impact on this case of the newly decided *Buckley*

v. American Constitutional Law Found., Inc.,119 S. Ct. 636 (1999). Minute Sheet dated January 27, 1999. In conjunction with his supplemental memorandum, the Secretary submitted the affidavit of Denise J. Garland, assistant director of elections, providing updated information on the total number of registered voters and the estimated voting-age population of Maine. Affidavit of Denise J. Garland ("Garland Aff.") (Docket No. 32). The plaintiffs move to strike the affidavit on grounds that it is untimely and the court did not authorize its submission. Strike Motion.

Inasmuch as (i) the Garland affidavit explains that the more recent statistics reported therein became available subsequent to the Secretary's initial provision of similar statistics on November 2, 1998, (ii) the plaintiffs articulate, and I can perceive, no particular prejudice of the kind that would counsel exclusion of late-filed materials (such as impact on trial preparation or trial strategy), and (iii) the court in any event could take judicial notice of statistics such as those proferred by Garland, *see, e.g., Barber v. Ponte*, 772 F.2d 982, 998 (1st Cir. 1985), I deny the plaintiffs' motion to strike the Garland affidavit and grant that of the Secretary to admit it for purposes of summary judgment.[3]

II. Cross-Motions for Summary Judgment

A. Applicable Legal Standards

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the

[3]Because the Garland affidavit simply communicates statistics gleaned from the records of the Secretary of State and the Maine Department of Human Services, the plaintiffs are not prejudiced by lack of opportunity to submit material in rebuttal. In any event, the plaintiffs did not suggest that they would require such an opportunity were their motion denied or that of the Secretary granted. *See* Strike Motion.

nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). In cases such as this, involving cross-motions for summary judgment, the court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a matter of law. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2720, at 336-37 (1998).

B. Factual Context

I consider as an initial matter the Secretary's objection that an affidavit of John M. Michael contains a proposition contradictory to that set forth in earlier deposition testimony and accordingly should be disregarded. Defendant's Reply Memorandum in Further Support of His Motion for Summary Judgment ("Defendant's SJ Reply") (Docket No. 28) at 1-2 & n.1.

At a deposition taken September 25, 1998 Michael testified that On Our Terms, a political action committee that he chairs, was created in mid-1997 for the purpose of campaigning for a voluntary term limits initiative. Deposition of John M. Michael dated September 25, 1998 ("First

Michael Dep.") at 8, 18, 96-97. In response to the Secretary's motion for summary judgment, the plaintiffs submitted an affidavit dated November 16, 1998 in which Michael stated that On Our Terms "is the Political Action Committee that I use to conduct petition drives in Maine." Affidavit of John Michael dated November 16, 1998 ("First Michael Aff.") (Docket No. 25) at 1. Michael detailed problems he had encountered in conducting his petition-drive business as an alleged result of Maine's ban on the payment of initiative-petition circulators on a per-signature basis and its requirement that circulators be residents of Maine. *Id*. at 1-3.

A party may not permissibly generate an issue of material fact for summary-judgment purposes on the basis of an affidavit directly contradicting earlier sworn deposition testimony — at least not without some plausible explanation for the discrepancy. *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1st Cir. 1994). However, a statement that an organization was formed for a particular purpose does not directly contradict a statement that the organization has become involved in other pursuits. I shall therefore consider the Michael affidavit for purposes of summary judgment.

The presentation of certain other evidence is, however, sufficiently deficient as to warrant its exclusion from the summary-judgment record. The plaintiffs do not address in their statement of material facts, or otherwise provide any record support for, descriptions in their complaint of plaintiffs Jason Smith as a Maine resident and unregistered voter, Nancy Falster as a non-resident of Maine who would like to work as a circulator or Shannon L. Brady as a 17-year-old Maine resident who would like to circulate petitions. Complaint ¶¶ 1-3; Statement of Material Facts Pursuant to Local Rule 19(b) [sic] ("Plaintiffs' SMF") (Docket No. 16); Statement of Material Facts in Response to Defendant's Motion for Summary Judgment, etc. (Docket No. 24). In answering the

Complaint, the Secretary stated that he was without knowledge or information sufficient to form a belief as to the truth of the Smith, Falster and Brady allegations and therefore denied the same. Answer (Docket No. 5) ¶¶ 1-3.[4]

Bare, unsupported allegations such as those concerning Smith, Falster and Brady fail to meet minimal standards for inclusion in a summary-judgment record. *See* Fed. R. Civ. P. 56(e) (concerning the character of evidence to be adduced); Local R. 56 (requiring reference in separate statement of material facts supported by appropriate record citations). I shall accordingly disregard them for purposes of the pending cross-motions. *See, e.g., Pew v. Scopino,* 161 F.R.D. 1, 1 (D. Me. 1995) ("The parties are bound by their Rule [56] Statements of Fact and cannot challenge the court's summary judgment decision based on facts not properly presented therein.")[5]

In view of the foregoing, the following are the undisputed facts material to the grounds upon which I base my recommended decision on the parties' cross-motions for summary judgment.

The constitution of the State of Maine reserves to its people the right to veto or initiate legislation by means of initiative and referendum procedures. Me. Const. art. IV, §§ 17-21. The constitution provides in relevant part:

§ 18. Direct initiative of legislation

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[4]In contesting Brady's standing to sue, the Secretary subsequently adduced evidence that she had turned 18 on September 10, 1998. *See* certified copy of driver's permit, attached to Statement of Material Facts in Support of Defendant's Motion for Summary Judgment ("Defendant's SMF") (Docket No. 19).

[5]The plaintiffs further offend Local Rule 56 by failing in several instances to provide pinpoint citations, needlessly compounding the work of the court. *See generally* Plaintiffs' SMF.

Section 18.

1. Petition procedure. The electors may propose to the Legislature for its consideration any bill, resolve or resolution, including bills to amend or repeal emergency legislation but not an amendment of the State Constitution, by written petition addressed to the Legislature or to either branch thereof and filed in the office of the Secretary of State . . . .

2. Referral to electors unless enacted by the Legislature without change; number of signatures necessary on direct initiative petitions; dating signatures on petitions; competing measures. For any measure thus proposed by electors, the number of signatures shall not be less than 10% of the total vote for Governor cast in the last gubernatorial election preceding the filing of such petition. The date each signature was made shall be written next to the signature on the petition, and no signature older than one year from the written date on the petition shall be valid. The measure thus proposed, unless enacted without change by the Legislature at the session at which it is presented, shall be submitted to the electors together with any amended form, substitute, or recommendation of the Legislature, and in such manner that the people can choose between the competing measures or reject both. . . .

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§ 20. Meaning of words "electors," "people," "recess of Legislature," "statewide election," "measure," "circulator," and "written petition"; written petitions for people's veto; written petitions for direct initiative

Section 20. As used in any of the 3 preceding sections or in this section the words "electors" and "people" mean the electors of the State qualified to vote for Governor; . . . "circulator" means a person who solicits signatures for written petitions, and who must be a resident of this State and whose name must appear on the voting list of the city, town or plantation of the circulator's residence as qualified to vote for Governor; "written petition" means one or more petitions written or printed, or partly written and partly printed, with the original signatures of the petitioners attached, verified as to the authenticity of the signatures by the oath of the circulator that all of the signatures to the petition were made in the presence of the circulator and that to the best of the circulator's knowledge and belief each signature is the signature of the person whose name it purports to be, and accompanied by the certificate of the official authorized by law to maintain the voting list of the city, town or plantation in which the petitioners reside that their names appear on the voting list of the city, town or plantation of the official as qualified to vote for Governor. The oath of the circulator must be sworn to in the presence of a person authorized by law to administer oaths. . . . The petition shall set forth the full text of the measure requested or proposed. Petition forms shall be furnished or approved by

> the Secretary of State upon written application signed in the office of the Secretary of State by a resident of this State whose name must appear on the voting list of the city, town or plantation of that resident as qualified to vote for Governor. . . .

Me. Const. art. IV, §§ 18, 20.

The state's provisions for initiatives and referenda are further detailed in 21-A M.R.S.A. §§ 901-06, which provide *inter alia* that petitions "may be circulated by any registered voter" and that the Secretary must prepare complete instructions on petition requirements, including a listing of "conditions which have been held to invalidate either individual signatures or complete petitions." 21-A M.R.S.A. §§ 903, 903-A. These instructions, in turn, "must be printed in bold type or capital letters on the petition." *Id.* § 903.

State statutory law also establishes that commission of certain acts in the course of the initiative process constitutes a Class E crime:

> **1. False statement.** A circulator of an initiative or referendum petition who willfully swears that one or more signatures to the petition were made in his presence when those signatures were not made in his presence or that one or more signatures are those of the persons whose names they purport to be when he knows that the signature or signatures are not those of such persons;
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> **2. False acknowledgement of oath.** A person authorized by law to administer oaths who willfully and falsely acknowledges the oath of a circulator of an initiative or referendum petition when that oath was not made in his presence;
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> **3. Unauthorized signature.** A person who knowingly signs an initiative or referendum petition with any name other than his own; or
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> **4. Duplicate signature.** A person who knowingly signs his name more than once on initiative or referendum petitions for the same measure.

21-A M.R.S.A. § 904.

In 1993 the legislature enacted "An Act to Promote Integrity in the Citizens Petition Process," codified at 21-A M.R.S.A. §§ 904-A and 904-B, effective July 14, 1994, which provided in its

entirety:

> **§904-A. Payment per signature; prohibition**
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> A circulator of an initiative or a referendum petition or a person who causes the circulation of an initiative or referendum petition may not receive payment for the collection of signatures if that payment is based on the number of signatures collected. Nothing in this section prohibits a circulator of an initiative or a referendum petition or a person who causes the circulation of an initiative or referendum petition from being paid a salary that is not based on the number of signatures collected.
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> **§904-B. Payment for signature; prohibition**
>
> A circulator of an initiative or a referendum petition or a person who causes the circulation of an initiative or referendum petition may not pay or offer to pay any compensation to a person for the person's signature on the initiative or referendum petition.

Ch. 599, 1993 Me. Laws 1505.

The legislature amended section 904-A in 1997 to shift the focus of its prohibition to payment per signature rather than receipt of such payment. "An Act to Require Responsibility of the Employers of Persons who Collect Signatures" reworded section 904-A effective June 26, 1997 as follows:

> **§904-A. Payment per signature; prohibition**
>
> A person may not pay a circulator of an initiative or a referendum petition or another person who causes the circulation of an initiative or referendum petition for the collection of signatures if that payment is based on the number of signatures collected. Nothing in this section prohibits a circulator of an initiative or a referendum petition or a person who causes the circulation of an initiative or referendum petition from being paid a salary that is not based on the number of signatures collected.

Ch. 61, 1997 Me. Laws 325.

In the view of Brian MacMaster, director of investigations for the State of Maine Attorney

General, violation of section 904-A subjects the offender to criminal penalties. Deposition of Brian MacMaster at 3, 12. The Secretary has not, however, rejected any signatures or petitions on grounds that circulators were paid per signature in violation of section 904-A, and does not believe that he has the authority to do so. Affidavit of Julie L. Flynn ("Flynn Aff.") (Docket No. 20) ¶ 9. The Secretary does refuse to validate petitions circulated by non-registered voters. Deposition of Julie Flynn ("Flynn Dep.") at 11-12.

IRI is a non-profit organization incorporated in Nebraska in January 1998. Deposition of M. Dane Waters ("Waters Dep.") at 39. It engages in educational and research activities relating to the initiative and referendum process and becomes involved in litigation when it believes that laws regarding initiatives and referenda are unconstitutional. *Id*. at 40-41. IRI does not participate in the initiative or referendum process of any state and does not engage in any political activities. *Id*. at 43.

ASPP is a non-profit organization incorporated in Nebraska at the same time as was IRI. *Id*. at 56. ASPP can engage in political activities and participate in initiative campaigns in other states by providing financial support and assistance in drafting initiatives. *Id*. at 56-57. It is not currently involved in any initiative or referendum campaigns in Maine. *Id*. at 62. ASPP has discussed with John Michael the possibility of organizing potential initiatives in Maine but has not asked him or anyone else to bid to organize such a campaign because of a perception that Maine law makes such campaigns cost-prohibitive. *Id*. at 63-65. This perception is based on the personal involvement of M. Dane Waters, president of ASPP, in initiative campaigns in Maine and North Dakota, both of which ban payment per signature to circulators, and Waters' conversations with others involved in

initiative campaigns.[6] *Id*. at 58, 95-100.

ASPP believes that, were it to attempt to sponsor an initiative campaign in Maine, no one would be willing to contract to organize such a campaign, or if anyone were willing, the price of such a contract would be inflated by fifty to one hundred percent, because of the payment-per-signature ban. *Id*. at 128-29. Persons in Maine with whom ASPP has communicated have stated that if the law stays in place they will not guarantee an overall budget for an initiative campaign, as a result of which ASPP would be forced to absorb the risk of cost overruns. *Id*. at 129-30. ASPP's donors would not be interested in contributing to such a campaign. *Id*. at 130.

ASPP also identifies Maine's ban on the use of non-resident circulators as limiting its ability to put together a grass-roots campaign. *Id*. at 124. Professional circulators, who are not necessarily residents of the state, tend to collect substantially more signatures than volunteers. *Id*. at 115-19.

PCI is a privately held corporation formed in 1992 and based in Santa Monica, California. Paparella Dep. at 7-9. It is a for-profit business that provides consulting, field-work and organizing services to clients involved in initiative campaigns. *Id*. at 8, 10. PCI was hired in 1997 to collect signatures in Maine by an organization known as Mainers for Medical Rights. *Id*. at 17, 46-47. PCI has not participated in any other petition drive in Maine.[7] *Id*. at 17.

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[6]Waters found that payment-per-signature prohibitions added to the cost and difficulty of waging such campaigns and obliged petition organizers to monitor circulators' performance more closely and recruit a greater number of circulators to obtain the number of signatures necessary to qualify an initiative for the ballot. *Id*. at 96-97, 100-05.

[7]PCI spent $175,000 "on an issue which should have been a slam dunk in the State of Maine, medical marijuana" and didn't qualify for the ballot because, in Michael's opinion, "it doesn't work to do it per hour." Deposition of John Michael dated September 29, 1998 ("Second Michael Dep.") at 49. According to Michael, PCI spent two to three times more than it would have had it been able to pay circulators on a per-signature basis. *Id*.

In PCI's experience, payment of circulators by the hour drives up costs both because circulators are paid as employees instead of as independent contractors (thus adding tax costs) and because circulators, who are unsupervised, are less productive. *Id*. at 128-30. This can affect PCI's business in two ways: deterring a potential client because of increased cost or causing PCI to decrease its charges to attract a client. *Id*. at 131. The residency requirement imposes two burdens: the need to spend extra time checking circulators' qualifications and the need to obtain additional signatures if the state rejects signatures obtained by non-residents. *Id*. at 131-32. The Secretary did in fact invalidate signatures on that ground during the Mainers for Medical Rights campaign in Maine. *Id*.

U.S. Term Limits is a non-profit corporation whose primary mission is to advance the enactment of term-limit laws at all levels of government nationwide. Deposition of Paul Jacob ("Jacob Dep.") at 11-12. Reports on file with Maine's Commission on Governmental Ethics and Election Practices ("Ethics Commission") show that U.S. Term Limits contributed $146,411.12 toward a 1993-94 initiative campaign and $43,260 toward a 1995-96 initiative campaign. Affidavit of Phyllis Gardiner (Docket No. 21) ¶¶ 2-3. Ethics Committee reports also reflect total expenditures of $158,867.18 for the 1993-94 campaign and $63,992.74 for the 1995-96 campaign. *Id*. Both initiatives qualified for the ballot. First Michael Dep. at 39; Flynn Aff. ¶ 7-A. In both campaigns, petition circulators were paid on a per-signature basis. First Michael Dep. at 48; Jacob. Dep. at 37-39.

On July 3, 1997 Michael and five other individuals applied to the Secretary for approval to circulate an initiative petition regarding voluntary congressional term-limit pledges. Application for Citizen Initiative, Exh. 6, John Michael Deposition Exhibits ("Michael Dep. Exhs."); Affidavit of

John M. Michael dated May 18, 1998 ("Second Michael Aff.") (Docket No. 3) at 1. By letter dated July 28, 1997 Michael informed U.S. Term Limits that he would commit to conducting the petition drive at a cost of $55,125 — a figure that included estimated payments of $36,750 to petition circulators and a consulting fee of approximately $12,000 for Michael's services as the campaign's organizer. Letter dated July 28, 1997 from John M. Michael to Dane Waters, Exh. 11, Michael Dep. Exhs.; Expense Estimates 1997 Drive, Exh. 12, Michael Dep. Exhs.; First Michael Dep. at 121-22. Michael anticipated that it would take at least until December 1997 to collect enough signatures to qualify the initiative measure for the ballot. First Michael Dep. at 123. On Our Terms was formed for the purpose of sponsoring and promoting the 1997 initiative. *Id*. at 96-97. On July 29, 1997 On Our Terms received a contribution from U.S. Term Limits in the amount of $7,500. State of Maine Political Action Committee Report dated October 15, 1997 ("PAC Report"), Exh. 9, Michael Dep. Exhs., at Schedule A.

On August 12, 1997 the Secretary granted approval to circulate petitions related to the 1997 initiative, advising that the deadline for submitting petitions to the Secretary in time to qualify the measure for the November 1998 ballot was 5 p.m. on February 2, 1998. Flynn Aff. ¶ 3. Shortly after receiving approval from the Secretary, in August 1997, On Our Terms began circulating petitions. Second Michael Dep. at 11. On Our Terms recruited circulators through telephone contacts and advertisements. First Michael Dep. at 104. The circulators were offered pay of $6.00 per hour in exchange for collecting a minimum of twelve signatures per hour, with a proviso that On Our Terms would not pay for more than one unproductive hour (*e.g.*, one hour in which fewer than twelve signatures were collected). Second Michael Dep. at 19, 25.

Of the $7,500 contributed by U.S. Term Limits, On Our Terms expended $807.14 to pay

thirteen individuals for circulating initiative petitions during the period from August 18 through September 10, 1997. PAC Report at Schedule B-1. Michael was paid a total of $5,335 during the period from July 30 through September 10, 1997 for "consulting, organizing" work on the petition drive, plus $175.60 for travel and tolls. *Id*.

On Our Terms, in collaboration with U.S. Term Limits, suspended all efforts to collect signatures for the 1997 initiative by the first week in September 1997. Second Michael Dep. at 42; Waters Dep. at 99, 105-06. All petitions containing signatures collected during the 1997 initiative subsequently were destroyed. Second Michael Dep. at 8-9. No petitions related to the initiative were submitted to the Secretary's office for review. Flynn Aff. ¶ 5.

According to Michael, On Our Terms decided, in collaboration with U.S. Term Limits, to halt the 1997 initiative because "it became obvious very quickly that to manage a petition drive trying to pay per hour is a serious burden" that "immediately placed the cost of the petition drive in question." Second Michael Dep. at 43-44. *See also* Waters Dep. at 99 (because no one could guarantee actual cost of drive when circulators paid on hourly basis, U.S. Term Limits agreed with decision to end it).[8]

According to Michael and Waters, the ban on payment per signature led to the following difficulties:

1. A diminution in circulators' incentive to work hard and a resulting decline in productivity. Michael's sense was that circulators were not gathering signatures in sufficient numbers to qualify the 1997 initiative for the ballot by the deadline; they would not "stay out the

[8]Waters was responsible for overseeing the 1997 initiative on behalf of U.S. Term Limits. Waters Dep. at 98-99, 102.

extra time if there's not some incentive for them to get those numbers, and they won't ask everybody that comes by." Second Michael Dep. at 36, 55. "[P]eople who are too lazy to work or simply not skilled at the job, will work all day with little or no results if they are being paid per hour." Second Michael Aff. at 2. The payment method also stymied the creativity needed to prospect for good sites in which to solicit signatures, a challenging task because most supermarkets and all major malls in Maine ban petitioning. *Id*. at 1.

2. An administrative burden. Michael found paying by the hour "functionally unworkable" because he had no way to know how many hours someone actually worked. Second Michael Dep. at 48. *See also* Waters Dep. at 103-04 (payment by hour during 1997 initiative was a "constant management issue," whereas no management required when circulators are paid by signature). "[I]t's considerably offensive to have to go and pay people per hour in a job which is perfectly constructed to have people fetch things such as apples and signatures and pay them by what they've gathered and reward them for that." Second Michael Dep. at 46.

U.S. Terms Limits has informed Michael that, if this lawsuit is successful, it wants him to submit a bid to resume collection of signatures on the term-limit pledge initiative or its equivalent. First Michael Aff. at 1.

Michael avers that, in its guise as the political action committee that he uses to conduct petition drives in Maine, On Our Terms has encountered the following recent difficulties:

1. Inability to bid for work collecting signatures for a petition drive active as of November 1998 relating to gaming in the State of Maine. *Id*. Michael informed proponents of the gaming measure that he would not bid because the ban on payment per signature rendered him unable to gauge the cost of gathering those signatures. *Id.* He offered to consult instead, at a significant loss

of income, but his consulting proposal was not accepted. *Id*.

2. Inability to assist PCI in mid-November 1997 with the medical-marijuana initiative using a so-called "Massachusetts crew" because of Maine's prohibition on use of non-resident circulators and because of the unwillingness of that crew, including Gary and Karen Fincher of Lewiston, Maine, to work unless paid on a per-signature basis.[9] *Id*. at 2. As a result, the crew travelled to Washington state to work, incurring the burden of traveling three thousand miles instead of two hours north. *Id*.

3. Uncertainty whether Michael would be able to offer circulators work in Maine immediately after a Massachusetts petition drive ended. *Id*. at 3. It is much more attractive for a circulator to consider travelling hundreds or thousands of miles for what would be at least sixteen weeks of good work rather than only the ten offered in Massachusetts. *Id*. at 2-3.

Other factors besides the methodology of payment to circulators determine the cost of a signature-gathering campaign for an initiative measure. These include the amount of time available to gather signatures, weather conditions, whether the time frame includes an election-day opportunity to collect signatures at the polls and the popularity of the proposed initiative measure itself. Paparella Dep. at 18-19, 25; First Michael Dep. at 62-64; Jacob Dep. at 38-39, 48-49.

Since July 1994 at least seven petition drives have been completed successfully in Maine, with enough signatures gathered to get initiative measures or referenda on the ballot. Flynn Aff. ¶ 7. No new initiatives have qualified for the ballot in Maine since 21-A M.R.S.A. § 201-A was

[9]As the Secretary points out, there is evidence that Gary Fincher worked on the On Our Terms 1997 initiative drive for hourly pay. *See* Defendant's SJ Reply at 2-3; Second Michael Dep. at 60-62. This is not necessarily inconsistent, however, with an unwillingness to be paid on anything but a per-signature basis in a separate campaign as of November 1997, after the 1997 term-limits initiative was halted.

amended in 1997. Flynn Dep. at 25. The proponents of initiative campaigns are not required to, and do not, provide the Secretary's office with any information concerning whether petition circulators were paid and, if so, how. Flynn Aff. ¶ 8.

To register to vote in Maine, an individual must fill out a Maine Voter Registration Application form and either mail it or deliver it in person to the registrar of the municipality in which he or she resides. *Id.* ¶ 10 and Maine Voter Registration Application, attached thereto.

The estimated voting-age population of Maine (*i.e.*, Maine residents age 18 and over) was 944,785 as of July 1997 and 943,797 in 1996. Garland Aff. ¶ 2-B & Exh. S-2 thereto; Flynn Aff. ¶ 12. There were 933,753 registered voters in Maine as of November 1998 and 953,368 as of November 1997. Garland Aff. ¶ 2-A & Exh. S-1 thereto; Flynn Aff. ¶ 11. Returns for the election of November 1997 indicate that 66,048 people voted on a referendum question in the nine municipalities with the largest number of registered voters. Flynn Aff. ¶ 13.

C. Discussion

The plaintiffs seek summary judgment with respect to their constitutional challenges to three initiative-and-referendum restrictions imposed by the State of Maine: (i) the prohibition on payment per signature, on free-speech and equal-protection grounds, (ii) the requirement that circulators be registered voters, on free-speech and equal-protection grounds, and (iii) the requirement that circulators be residents, on free-speech, equal-protection and privileges-and-immunities grounds. *See generally* Plaintiffs' SJ Motion; Opposition to Defendant's Motion for Summary Judgment, etc. ("Plaintiffs' SJ Opposition") (Docket No. 23).[10] The Secretary as a threshold matter challenges the

[10]In neither their papers supporting summary judgment nor those opposing the Secretary's cross-motion do the plaintiffs press the following allegations of Counts III, V and VI of their (continued...)

standing of several plaintiffs. Defendant's SJ Motion at 1-3.

1. Standing

The Secretary initially questions the standing of four plaintiffs — IRI, ASPP, PCI and Shannon L. Brady — and urges their dismissal from the instant suit. Defendant's SJ Motion at 1-3. I agree that the four should be dismissed. The record demonstrates that IRI does not engage in any political activities, including initiative campaigns. IRI thus fails to demonstrate any interest in the subject matter of this suit other than that of a keen onlooker — a level of interest plainly insufficient to confer standing to sue. *See, e.g., Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1019 (1998) ("psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.") (citations omitted); *Campbell v. Buckley*, 11 F. Supp.2d 1260, 1262 (D. Colo. 1998) (dismissing IRI, ASPP from suit challenging Colorado initiative provisions).

Brady, too, alleges no concrete Article III injury. The Secretary demonstrates that Brady turned 18 on September 10, 1998. *See* certified copy of driver's permit, attached to Defendant's SMF. A person must be 18 to register to vote in Maine (and thus to qualify on that ground as a initiative petition circulator). 21-A M.R.S.A. § 111(2). Brady therefore lacks standing to challenge

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[10](...continued)
complaint: (i) that the ban on circulation by persons under age 18 is unconstitutional, (ii) that the state's restrictions on the initiative and referendum process violate the commerce clause and (iii) that those restrictions offend the plaintiffs' right to due process. Complaint ¶¶ 23, 27, 19; *see generally* Plaintiffs' SJ Motion; Plaintiffs' SJ Opposition. I therefore consider those allegations waived. *See, e.g.,Graham v. United States*, 753 F. Supp. 994, 1000 (D. Me. 1990) ("It is settled beyond peradventure that issues mentioned in a perfunctory manner, unaccompanied by some effort at developed argumentation are deemed waived.") (citation and internal quotation marks omitted). The plaintiffs also suggest in passing that the challenged restrictions offend their First and Fourteenth Amendment right to vote. *See, e.g.*, Plaintiffs' SJ Motion at 18, 35. Because they offer no developed argumentation of that point, I consider it as well waived.

Maine's initiative and referenda restrictions on grounds that they prevent her from circulating petitions because of her age, the only basis for her claim of injury.

The question is a closer one with respect to ASPP and PCI, which allege harms flowing from the challenged restrictions. At bottom, though, the harms described by both fall on the "conjectural" and "hypothetical" end of the scale, lacking the quality of "concrete" and "actual or imminent" injury essential to standing. *See, e.g., Steel*, 118 S.Ct. at 1016. ASPP testifies that, were it to solicit bids for the organization of an initiative campaign in Maine, it either would obtain none or, if any were forthcoming, they would be high because of the impact of Maine's initiative restrictions. However, it has not actually sought any such bids.

PCI, a for-profit business, testifies that Maine's restrictions could harm it by deterring clients from engaging its services or forcing it to cut its charges; however, again, there is no concrete evidence that such harm has transpired or can be expected imminently to result. There is evidence that one of PCI's clients, Mainers for Medical Rights, suffered injury emanating from Maine initiative restrictions (*e.g.*, increased costs and rejection by the Secretary of petition signatures on grounds they were collected by non-residents). However, Mainers for Medical Rights is not a party to the instant suit, and the plaintiffs point to no evidence that its difficulties inflicted any injury on PCI.

Plaintiffs IRI, Brady, ASPP and PCI accordingly should be dismissed.

2. Payment-Per-Signature Ban

a. First and Fourteenth Amendments

The plaintiffs first challenge 21-A M.R.S.A. § 904-A, Maine's ban on per-signature payment to circulators, on grounds that it offends their First and Fourteenth Amendment right to freedom of

speech. Plaintiffs' SJ Motion at 10-24. After careful review, I conclude that summary judgment for either side is unwarranted as to this claim. Although the parties do not dispute the basic pallette of primary facts, they sharply contest the ultimate fact of the image to be drawn therefrom. On Our Terms and its backer, U.S. Term Limits, contend that they mounted a serious campaign in 1997 to qualify a term-limits initiative for the ballot. In their view this campaign foundered because they were not able to pay circulators on a per-signature basis. The Secretary, by contrast, perceives the 1997 initiative as a half-hearted (if not feigned) attempt, sandbagged chiefly by the organizers' own acts or omissions. *See, e.g.*, Defendant's SJ Motion at 24 & n.16. Either perception is plausible.

The Secretary identifies several facts from which one reasonably could draw the inference that the 1997 initiative failed primarily because of the feebleness of its organizers' efforts. These include the brevity of the campaign (approximately three weeks), the tiny fraction of budgeted monies expended for circulators' services (as opposed to Michael's consulting fee) and the passing up of an opportunity to collect signatures during the November 1997 elections. *Id*. The Secretary notes that since the enactment of section 904-A in 1994 several initiative petitions have qualified for the ballot in Maine — a fact that arguably reinforces the view that the plaintiffs failed for lack of effort. *Id*. at 24-25.

On Our Terms and U.S. Term Limits offer the testimony of those directly involved in organizing and overseeing the 1997 initiative (Michael and Waters) that the ban on payment per signature precipitated a decline in circulators' productivity and undermined confidence in the cost estimates and likelihood of success of the campaign.[11] They point out that since 1997, when section

[11]These observations are reinforced by testimony that, as a result of inability to gauge costs arising from the ban on payment per signature, On Our Terms subsequently declined to bid on work (continued...)

904-A was amended to proscribe payment per signature (rather than receipt of such payment), no initiative petition has qualified for the ballot in Maine. Plaintiffs' SMF ¶ 6; Plaintiffs' SJ Opposition at 3. Although the plaintiffs offer no additional concrete evidence, the testimony of Michael and Waters suffices to raise a genuine issue of material fact. A trier of fact, were it to find this testimony credible, could rationalize other seemingly damning facts, such as the brevity of the campaign and lack of spending on circulators, as byproducts of the harsh effects of the payment-per-signature ban.

The parties' factual dispute is material to the outcome of this claim. Upon accepting the plaintiffs' version of events, one would have little difficulty concluding that Maine's ban on payment per signature severely burdened their attempt to circulate an initiative petition in 1997. The impact of section 904-A, in that scenario, would be comparable to that of the complete ban on payment to initiative-petition circulators struck down in *Meyer v. Grant*, 486 U.S. 414 (1988). Both restrictions would have the effect of "mak[ing] it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." *Id*. at 423. *See also Term Limits Leadership Council, Inc. v. Clark*, 984 F. Supp. 470, 473 (S.D. Miss. 1997) (noting, in striking down ban on payment per signature, that plaintiffs demonstrated *inter alia* that circulators paid on flat daily rate collected far fewer signatures than those paid per signature).[12]

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[11](...continued)
collecting signatures for a Maine gaming initiative and that circulators, including Gary and Karen Fincher of Lewiston, Maine, were unwilling to work on a medical-marijuana initiative in November 1997 unless paid on a per-signature basis.

[12]The Secretary distinguishes *Clark* by noting that, whereas the plaintiffs in *Clark* produced significant concrete evidence of the impact of the payment-per-signature ban, the plaintiffs here offer nothing but conclusory allegations. *See* Defendant's SJ Motion at 22-24 & n.15. I agree with the (continued...)

In these circumstances, a strict standard of scrutiny would apply. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (regulations that severely restrict First and Fourteenth Amendment rights must be "narrowly drawn to advance a state interest of compelling importance.") (citation and internal quotation marks omitted). The Secretary — at least on this record — would fall short of meeting that exacting test. The Secretary asserts that section 904-A serves the compelling interest of avoiding an appearance of fraud and corruption engendered by a "bounty-hunting" system of signature collection. Defendant's SJ Motion at 29. The Secretary reasons that a petition circulator engages in core political speech that is virtually indistinguishable from legislative advocacy. *Id*. at 27. Thus, "the same considerations of integrity supporting the reasons why state-house legislators are not rewarded based upon their success in garnering such legislative votes parallel the considerations supporting Maine's prohibition on bounty-hunting by citizen legislators." *Id*.

The Secretary acknowledges that he offers no proof that payment per signature does in fact generate fraud or corruption. *Id*. He argues, however, that such proof generally is unnecessary. *Id*. at 27-28. Such is not the case when a challenged regulation heavily burdens core rights. In the

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[12](...continued)
Secretary that, as a preliminary matter, the plaintiffs must adduce evidence of the nature of the burden imposed by the challenged restrictions. *See id.* at 24 n.15 (criticizing *Limit v. Maleng*, 874 F. Supp. 1138 (W.D. Wash. 1994), for court's failure to discuss or possibly even require evidence of burden prior to striking down payment-per-signature ban). It is not self-evident that a ban on one form of payment to circulators (as opposed to a complete ban on payment) substantially burdens petition proponents' free-speech rights. *Compare, e.g., Meyer*, 486 U.S. at 423-24 (noting that lower court had acknowledged that complete ban had "inevitable" effect of reducing total quantum of speech). However, the plaintiffs do adduce evidence of the nature of the burden through the testimony of Michael and Waters. Because a trier of fact, were it to credit that testimony, could find in the plaintiffs' favor, this suffices to avoid summary judgment on the underlying claim. The issue of the credibility of the Michael and Waters testimony, in view of the lack of corroborating data, properly is addressed to the trier of fact.

world of strict scrutiny, such suppositions cannot be accepted at face value. *See, e.g., Meyer*, 486 U.S. at 426 ("we are not prepared to assume that a professional circulator . . . is any more likely to accept false signatures than a volunteer"). The ban on payment per signature suffers from an additional fatal flaw when viewed through the prism of strict scrutiny: It is too coarsely tailored to achieve the Secretary's stated objectives. The Secretary seeks through the mechanism of section 904-A to root out a potential cause of fraudulent or other unsavory behavior by petition circulators. Several existing statutes, however, directly address and proscribe such behaviors. Circulators, for example, are prohibited from paying or offering to pay persons to sign a petition. Circulators must also make an oath (the falsification of which is a Class E crime) that the signatures proferred were made in the circulator's presence and, to the best of the circulator's knowledge and belief, are the signatures of the persons whose names they purport to be.[13]

Acceptance of the Secretary's version of events, on the other hand, leads to the opposite result. The plaintiffs in that instance would have failed to link their difficulties during the 1997 initiative to the payment-per-signature ban. In the absence of evidence that the challenged statute severely burdened political speech, a less rigorous standard of scrutiny would apply. *See, e.g, Burdick*, 504 U.S. at 434 (when state election law imposes reasonable, non-discriminatory restrictions on voters' First and Fourteenth amendment rights, state's important regulatory interests generally suffice to justify restrictions).

Preservation of the integrity of the political process, including prevention of the appearance

[13]These statutes, moreover, appear to address the bulk of behavior that could cause concern. The sphere of fraud and corruption in which a circulator potentially could engage is far narrower than that into which a legislator could be drawn. The job of the petition circulator is to obtain signatures, not to make or vote on laws.

of fraud and corruption among initiative-petition circulators, is an important regulatory interest. The ban on payment per signature would pass muster as reasonable in two respects (i) that the plaintiffs would not have persuaded a trier of fact that the ban imposed any significant burden, and (ii) that the ban is a reasonable means to achieve the stated goal. Payment per signature, on its face, creates a temptation to engage in unseemly behavior (including falsifying signatures) to boost a circulator's income. The state's ban thus advances its interest in avoiding the appearance of fraud or corruption in the intiative-petition process. If the ban were found to impose little or no burden on the initiative-petition process, the state's interests would outweigh those of the plaintiffs. *See Burdick*, 504 U.S. at 439-40 (write-in voting ban a reasonable way of accomplishing Hawaii's legitimate interests in preventing maneuvers such as divisive sore-loser candidacies and "party raiding"; these legitimate interests outweighed limited burden imposed by ban on voters).[14]

Because (i) the parties offer clashing portraits of events during the 1997 term-limits initiative campaign, (ii) resolution of this dispute necessitates assessment of credibility and weighing of the strength of the evidence and (iii) resolution is outcome-determinative, I recommend denial of both cross-motions for summary judgment with respect to the plaintiffs' challenge on First and Fourteenth Amendment grounds to 21-A M.R.S.A. § 904-A.

b. Equal Protection Clause

The plaintiffs next complain that the payment-per-signature ban violates their right to equal protection of the laws. Plaintiffs' SJ Motion at 35-40. They contend that people who choose to engage in political speech via initiative petitions are treated differently than those who choose to do

[14]The plaintiffs argue that the ban also is discriminatory inasmuch as it violates their right to equal protection of the laws. Plaintiffs' SJ Motion at 35-40. This claim is without merit for the reasons discussed below.

so via other methods such as hiring lobbyists. *Id*. Maine imposes only one restriction on lobbyists' pay, prohibiting the acceptance of compensation contingent upon the outcome of any legislative action. *Id*. at 38; 3 M.R.S.A. § 318. Lobbyists otherwise are free to determine the manner in which they are compensated. Plaintiffs' SJ Motion at 38. The plaintiffs distinguish the contingency-pay prohibition from the payment-per-signature ban on the ground that signature collection is not done on a contingency basis and functions simply to ensure that circulators are working diligently. *Id*.

Even assuming *arguendo* that those who hire lobbyists are similarly situated to those who hire petition circulators, the plaintiffs fail to demonstrate any compelling difference in the manner in which the state treats the two groups with respect to pay restrictions. A per-signature payment is similar to a contingency arrangement in the sense that compensation depends on results. In essence, the legislature prohibits both groups from paying the chosen purveyor of a political message based upon the purveyor's success in obtaining the desired result. A showing of differential treatment is basic to an equal-protection cause of action. *See, e.g., Yerardi's Moody St. Restaurant & Lounge, Inc. v. Board of Selectmen,* 878 F.2d 16, 21 (1st Cir. 1989) ("the right to equal protection is the right not to be treated differently from those similarly situated.") (citation omitted). The claim accordingly is without merit.

The Secretary is entitled to summary judgment with respect to the plaintiffs' challenge to 21-A M.R.S.A. § 904-A on equal-protection grounds.

3. Registered-Voter Requirement

The plaintiffs contest Maine's constitutional and statutory requirements that circulators be registered voters on both free-speech and equal-protection grounds. Plaintiffs' SJ Motion at 24-34. On this record, neither challenge succeeds.

a. First and Fourteenth Amendments

In pressing their free-speech claim the plaintiffs pin their hopes primarily on *Buckley*, in which the Supreme Court struck down as repugnant to the First Amendment a Colorado requirement that initiative petition circulators be registered voters. *Buckley*, 119 S. Ct. at 645. The Court did not, however, decide the question in a vacuum. It made clear that it was "satisfied that . . . the restrictions in question significantly inhibit communication with voters about proposed political change[.]"[15] *Id*. at 642. Although Colorado had approximately 1.9 million voters, at least 400,000 persons eligible to vote were not registered. *Id*. at 643. The Court took note of additional statistics indicating that less than 65 percent of the voting-age population was registered to vote in Colorado in 1997. *Id*. at 643 n.15.

The Secretary in this case adduces undisputed evidence that the estimated voting-age population of Maine (*i.e.*, Maine residents age 18 and over) was 944,785 as of July 1997, compared with a pool of Maine registered voters totalling 933,753 as of November 1998. Earlier data is comparable, showing a voting-age population of 943,797 in 1996 and a total of 953,368 registered voters as of November 1997.[16] Thus, approximately 98.8 percent of Maine's voter-eligible population is registered to vote. These numbers do not in themselves sustain a claim of severe burden. Nor do the plaintiffs identify the existence of any particular obstacle imposed by the voter-registration requirement, *e.g.*, that as a direct result they were unable to hire sufficient numbers of

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[15]The Court characterized its decision as "entirely in keeping with the now-settled approach that state regulations impos[ing] severe burdens on speech . . . [must] be narrowly tailored to serve a compelling state interest." *Id*. at 642 n. 12 (citation and internal quotation marks omitted).

[16]The total number of registered voters appears to exceed the estimated voting-age population because local registrars do not always purge the names of registered voters who move or die. Flynn Aff. ¶ 12.

circulators or a particular initiative campaign was hurt.

Inasmuch as the evidence demonstrates at most the imposition of a slight burden, the less stringent standard of review applies. *See, e.g.*, *Burdick*, 504 U.S. at 434. The Secretary asserts that Maine's registration requirement serves the compelling interest of ensuring that Maine is governed by Mainers. Defendant's SJ Motion at 9-10. He observes that Maine possesses a fundamental power to restrict participation in its process of self-government to members of its own political community. *Id*. at 9. He reasons that it therefore can require that citizen-legislators, like legislators, be residents of the state. *Id*. at 10. He further contends that the requirement advances Maine's interest in policing the initiative process inasmuch as residents generally are likely to be more available to answer questions and to be within the jurisdiction of Maine courts. *Id*. at 10-11. The additional requirement that circulators be registered voters is deemed justifiable inasmuch as: (i) it is easy to register to vote in Maine, (ii) checking voter registration is an efficient means of ascertaining whether a person is a state resident, and (iii) the state may justifiably limit participation in a political process to those who are invested enough to take the trouble to register to vote. *Id*. at 14-15, 17-18.

The plaintiffs perceive petition circulators not as themselves citizen-legislators, but rather as the tools of citizen-legislators. Plaintiffs' SJ Opposition at 3. An analogy between petition circulators and legislators is far from perfect. Petition circulators wield no power to vote on legislation. The state reserves to registered voters all governance powers implicated by the initiative process, including the rights to apply for, sign petitions regarding and vote on initiative measures. Nonetheless, as the Supreme Court has recognized, petition circulators do engage in core political speech. *Meyer*, 486 U.S. at 421-22. In seeking to persuade Mainers to sign petitions, they perform a function integral to the process of self-government in Maine.

Maine's interest in limiting participation in its political process to its residents is compelling. *See Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68-69 (1978) ("[O]ur cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders.") (citations omitted). Because petition circulators play a vital role in the process of self-government, the state reasonably may require that such circulators be residents of Maine. Maine also has an important interest in holding circulators answerable for infractions of its initiative laws, which is advanced by its residency requirement. The registered-voter requirement primarily serves the state's legitimate, though less compelling, interest in administrative efficiency. The plaintiffs on this record place nothing on their side of the scale that would outweigh even the state's lesser interest in administrative ease.[17]

b. Equal Protection Clause

The plaintiffs next complain that the voter-registration requirement offends their right to equal protection of the laws. Plaintiffs' SJ Motion at 35-41. Initiative-petition circulators must be Maine registered voters; lobbyists need not be. *Id*. at 37. In addition, persons circulating other types of political petitions in Maine, such as those concerning political candidates and organization of new political parties, need not be Maine registered voters. *Id*. at 40 n.13.

The level of scrutiny applied to an asserted equal-protection violation, like that applied in a free-speech context, hinges on the nature of the harm alleged:

> Unless a statute provokes "strict judicial scrutiny" because it interferes with a "fundamental right" or discriminates against a "suspect class," it will ordinarily survive an equal protection attack so long as the challenged classification is rationally

[17]The plaintiffs also claim that the voter-registration requirement is discriminatory inasmuch as it violates their right to equal protection of the laws. Plaintiffs' SJ Motion at 35-41; Plaintiff's SJ Opposition at 3. That claim fails for the reasons discussed below.

related to a legitimate governmental purpose.

Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 457-58 (1988) (citations omitted). The plaintiffs do not claim that they are members of a suspect class. *See* Plaintiffs' SJ Motion at 35-41. Nor have they demonstrated that the registration requirement interferes with (as opposed to merely implicating) a fundamental right. The registration requirement therefore survives if it "bears a rational relation to a legitimate government objective[.]" *Id*. at 461-62. Such a relationship would be lacking "only if the statute's classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Id.* at 462 (citations and internal quotation marks omitted). For the reasons discussed in the context of the plaintiffs' free-speech challenge, such is not the case here.

The Secretary accordingly is entitled to summary judgment with respect to the plaintiffs' challenges to the requirement that circulators be registered voters of the State of Maine.

4. Residency Requirement

Finally, the plaintiffs attack Maine's constitutional requirement that circulators of initiative petitions be residents of the State of Maine on free-speech, equal-protection and privileges-and-immunities grounds. Plaintiffs' SJ Motion at 24-44. The record does not sustain these challenges.

The plaintiffs adduce no evidence that Maine's residency requirement imposes any particular burden on the initiative process.[18] Accordingly, a less rigorous standard of review applies for both free-speech and equal-protection purposes. For the reasons discussed in the context of voter

[18]Both ASPP and PCI contend that the residency requirement could affect the success of an initiative petition drive in Maine. However, as discussed above, the injury alleged by each is too speculative to confer standing. On Our Terms also contends that, partly as a result of Maine's residency requirement, it was forced to offer its Massachusetts crew work in Washington state instead of Maine, an inconvenience and burden to it. This does not, however, demonstrate that the residency requirement burdens the initiative-petition process in Maine.

registration, the Secretary's justifications for the residency requirement — that it serves to reserve governance of Maine to Mainers and to aid in the policing of the initiative process — survive scrutiny. *See* Defendant's SJ Motion at 9-11.

The plaintiffs finally argue that the residency requirement impinges on non-residents' fundamental privileges to pursue a common calling (paid work as a circulator in Maine) and to engage in Maine in the type of political speech represented by the circulation of petitions. Plaintiffs' SJ Motion at 41-44. The plaintiffs offer no evidence in support of the basic proposition that any one of them is a non-resident who wishes to work as a circulator in Maine. For this reason alone the claim founders.

The Secretary accordingly is entitled to summary judgment with respect to the plaintiffs' challenges to the requirement that circulators be residents of the State of Maine.

III. Conclusion

For the foregoing reasons, I **GRANT** the Secretary's motion to allow the affidavit of Denise J. Garland and **DENY** that of the plaintiffs to strike it, and recommend (i) that plaintiffs IRI, ASPP, PCI and Brady be dismissed for lack of standing, (ii) that the Secretary's motion for summary judgment be **GRANTED** as to all counts of the complaint against him except for that portion of Count I related to the plaintiffs' First Amendment challenge to Maine's payment-per-signature ban, 20-A M.R.S.A. § 904-A, as to which I recommend it be **DENIED**, and (iii) that the plaintiffs' motion for summary judgment be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum,

within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 23d day of April, 1999.

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David M. Cohen
United States Magistrate Judge